

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE ATM FEE ANTITRUST
LITIGATION,

No. C 04-02676 CRB

**ORDER RE: PLAINTIFFS' FOURTH
SET OF REQUESTS FOR
PRODUCTION OF DOCUMENTS**

This Document Relates To:

ALL ACTIONS

Now pending before the Court is Plaintiff's motion to compel. For the reasons set forth below, the motion is hereby GRANTED in part and DENIED in part.

BACKGROUND

In this action, Plaintiffs claim that the "interchange fee" charged by members of the Start ATM network is the product of an illegal price-fixing scheme. On a motion to dismiss, Judge Walker sustained Plaintiffs' claim because, at that stage of the litigation, he was bound to accept the Plaintiff's allegation that the interchange fee was not necessary to, or reasonably ancillary to, "the achievement of the joint venture's procompetitive benefits." Brennan v. Concord EFS, Inc., 369 F.Supp.2d 1127, 1135 (N.D. Cal. 2005). In response to Defendants' subsequent argument that they had not engaged in "concerted action" to fix prices in the context of their joint venture, this Court terminated their motion for partial summary judgment motion and directed the parties "to proceed forthwith with any discovery

1 necessary to elucidate the plausible procompetitive justifications that might be advanced in
2 support of the fixed interchange fee.” In re ATM Fee Antitrust Litig., No. 04-2676, at 1
3 (N.D. Cal. Nov. 30, 2006). The Court suggested that “[s]uch discovery need not be
4 extensive, for many of the plausible arguments are found in the very nature and structure of
5 the agreement itself, as to which all the parties by now have a thorough understanding.” Id.
6 at 6. In a further attempt to focus discovery on relevant issues, the Court directed Defendants
7 to set forth their procompetitive justifications in a preliminary proffer, which they did, albeit
8 not to Plaintiffs’ satisfaction. See Docket No. 374, at 13-19 (Mar. 13, 2007).

9 The Court’s aim in ordering further discovery was to provide the parties with a limited
10 opportunity to gather materials related to the economic consequences and justifications of the
11 interchange fee, which could then be tested on a motion for summary judgment. In
12 retrospect, this effort appears somewhat quixotic. In an antitrust case, nearly every aspect of
13 a defendant’s conduct or business can plausibly be viewed as relevant. See Bd. of Trade of
14 Chicago v. United States, 246 U.S. 231 (1918) (“To determine [the reasonableness of a
15 restraint or agreement] the court must ordinarily consider the facts peculiar to the business to
16 which the restraint is applied; its condition before and after the restraint was imposed; the
17 nature of the restraint and its effect, actual or probable. The history of the restraint, the evil
18 believed to exist, the reason for adopting the particular remedy, the purpose or end sought to
19 be attained, are all relevant facts.”).

20 Not unreasonably, Plaintiffs sought far-reaching discovery to test the merits of
21 Defendants’ putative procompetitive explanations for the interchange fee. Plaintiffs argue
22 that they are entitled to any and all information that might shed light on the reason for, the
23 history of, the theory underlying, the operation of, and the effects stemming from both the
24 interchange fee charged by Defendants specifically, and the operation of ATM and other
25 financial transactional networks generally.

26 The parties now find themselves at loggerheads, in numerous ways, about the proper
27 scope of discovery. That impasse generated the instant motion to compel. Plaintiffs argue
28 that they are entitled to “material regarding networks other than Star,” “material provided to

the government or in connection with [other] relevant private litigation,” “material regarding ATM networks in foreign countries,” “material from the inception of the Star network to date,” “materials regarding entities [that] Defendants acquired,” among other materials. Motion at 3-4. Defendants seek relief from what they perceive as the limitless scope of Plaintiffs’ demands.

The Court does not deny that the materials identified by Plaintiffs might assist them in their effort to debunk the proffered explanations for the interchange fee. Nonetheless, the Court agrees with Defendants that the tremendous scope of these discovery demands are unduly burdensome. Although the discovery rules entitle Plaintiffs to seek all material “reasonably calculated to lead to the discovery of admissible evidence,” their theoretical entitlement yields to practical considerations when “the burden or expense of the proposed discovery outweighs its likely benefit.” Fed. R. Civ. P. 26(b)(2)(C)(iii). See also Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd. of Culinary Workers, 542 F.2d 1076, 1082 (9th Cir. 1976) (“Particularly in antitrust litigation, the long drawn out process of discovery can be both harassing and expensive.”). But see In re Folding Carton Antitrust Litig., 83 F.R.D. 251, 253 (N.D. Ill. 1978) (approving antitrust plaintiffs’ “first wave interrogatories relating to industry information,” including “identification of studies, reports, statistical bulletins, analyses, memoranda, and data compilations of folding carton operations for enumerated economic measures”).

This order sets forth general guidance regarding what the Court considers the appropriate scope of discovery.¹ The parties’ discovery disputes fall into three general

¹ Defendants contend that Plaintiffs have failed to set forth their motion to compel in requisite detail. Cf. Nugget Hydroelectric, L.P. v. Pac. Gas & Elec. Co., 981 F.2d 429, 438-39 (9th Cir. 1992) (upholding a magistrate judge’s finding that a demand for “millions of pages of documents concerning every aspect of [the defendant’s business] relationships” was “unnecessarily burdensome and overly broad” where the plaintiff had “fail[ed] to make a ‘specific showing that the burdens of production would be minimal and that the requested documents would lead to relevant evidence’” (quoting Sorosky v. Burroughs Corp., 826 F.2d 794, 805 (9th Cir.1987))).

Here, the Court agrees that Plaintiffs have painted their discovery demands with a broad brush. For this reason, the Court is constrained to consider many of the disputes presented in the motion in categorical terms, rather than with detailed reference to disputed materials. Yet

categories: (1) the type of information that is discoverable, (2) the time periods as to which Plaintiffs may obtain discovery, and (3) the format in which discoverable information must be furnished by Defendants. The Court addresses each of these three issues in turn.

I. Types of Discoverable Information

This lawsuit is about a specific legal violation (*i.e.*, a violation of the *per se* prohibition against price-fixing, due to a specific course of conduct (*i.e.*, the imposition of a fixed interchange fee). The interchange fee is the anchor of Plaintiffs' case. The discovery process must not become unmoored from this issue, lest the case drift into a dispute about the most economically desirable structure of ATM networks generally. Although Plaintiffs rightly observe that discovery is not limited to Defendants' theory of the case, it is equally true that discovery *is* limited to the specific subject matter presented by Plaintiffs' complaint. It is from this perspective that the Court approaches Plaintiffs' various requests for documents.

1. *Other ATM Networks and ATM Transactions Abroad.* The Court finds that the production of information about ATM networks other than Star is unnecessarily burdensome. The Court reaches the same conclusion regarding ATM transactions occurring in foreign countries. It is true that such information may provide a basis for Plaintiffs to draw useful comparisons to the domestic Star network. But it is useful in any antitrust suit to understand how other market participants behave or how other markets operate. The usefulness of this information, however, pales in comparison to the burden of requiring an antitrust defendant to provide any and all information about its global industry and its competitors, as opposed to the anticompetitive practice alleged. Thus, to the extent that Plaintiffs demands the production information pertaining *exclusively* to other ATM networks, the Court finds that

this does not mean that Plaintiffs' motion is premature. Given the chasm between the parties' expectations about the appropriate scope of discovery, at least some guidance is necessary at this point, regardless of the abstract and general nature of some of Plaintiffs' demands. Here, the parties should view the Court's order as setting forth general guidance, rather than concrete commands. If the Court's order proves inadequate to resolve disputes about specific documents, the parties may seek an additional ruling from the Court--subject, of course, to the Northern District's meet-and-confer requirements. N.D. Cal. Civ. L.R. 37. The Court is cognizant of the real discovery dilemmas posed by the theoretical nature of an antitrust case and appreciates the extensive efforts that the parties have made to settle disputes on their own.

1 such demands are unreasonably broad. The Court draws the same conclusion with respect to
 2 ATM transactions occurring *exclusively* outside the United States. To the extent that
 3 Plaintiffs request the production of materials that themselves contain information about other
 4 or foreign ATM networks *and the domestic Star ATM network as well*, the Court finds that
 5 the production of such information is not unduly burdensome in light of its greater relevance.
 6 The Court notes, however, that Defendants appear to have agreed to produce such
 7 information. Cf. Motion at 15 (noting that Defendants agree to produce documents regarding
 8 Star that are otherwise discoverable and happen to mention other ATM networks); Concord
 9 EFS Opp. at 10 (noting an agreement wherein Defendants agreed that they “would not
 10 exclude an otherwise responsive document simply because it mentioned one of these other
 11 networks”).

12 **2. *Acquired or Merged Entities.*** Plaintiffs have apparently set aside their demand for
 13 documents related to NYCE and Cash Station, see Motion at 13 n.16, but continue to request
 14 documents related to other ATM networks, specifically MAC and Honor, which have been
 15 acquired by and incorporated into the Star ATM network. Plaintiffs claim that these
 16 “predecessor networks” are relevant because they may reveal Defendants’ approach to
 17 (re)configuring an ATM network. Defendants do not dispute the relevance of these
 18 materials, but they claim that these requests are “the most overbroad and unduly burdensome
 19 aspect of [Plaintiffs’ demands].” Further, Defendants note that Plaintiffs previously agreed
 20 to forego such materials. See Wallach Decl., Ex. B, at 2 (“The parties have agreed that
 21 Concord would not have to search for or produce Honor, MAC, or Cash Station documents
 22 prior to the time that these entities became part of Star.”). The only response that Plaintiffs
 23 provide for repudiating their prior agreement is that the agreement was executed before
 24 Defendants proffered their procompetitive justifications. Yet the proffer, contrary to
 25 Plaintiffs’ suggestion, nowhere explicitly mentions these other predecessor networks.

26 Although the predecessor networks are of obvious relevance to the lawsuit, the Court
 27 concludes that Plaintiffs must abide by their prior commitment to constrain their discovery
 28 requests to the Star ATM network, and not to the predecessor networks generally. The issues

1 presented in the case are not substantially different now than when the case began. Indeed,
2 the Court's directive "to proceed forthwith with any discovery necessary to elucidate the
3 plausible procompetitive justifications that might be advanced in support of the fixed
4 interchange fee" is directly related to Chief Judge Walker's initial ruling that Plaintiff's had
5 adequately pled that the interchange fee was not necessary to, or reasonably ancillary to, "the
6 achievement of the joint venture's procompetitive benefits." Brennan v. Concord EFS, Inc.,
7 369 F.Supp.2d at 1135. In short, despite the twists and turns of this litigation, the playing
8 field has not changed dramatically since Plaintiffs agreed in January of 2006 to forego the
9 materials they now demand.

10 A caveat is in order, however. The agreement apparently reached by the parties does
11 not indicate exactly what is meant by the phrase "prior to the time that these entities became
12 part of Star." Wallach Decl., Ex. B, at 2. The Court construes this limitation to encompass
13 information and documents pertaining to these predecessor networks as they existed before
14 Concord incorporated them under their corporate umbrella. The Court does not view the
15 agreement as placing a restriction on Plaintiffs ability to obtain information relating to
16 changes made to MAC subsequent to its acquisition by Star in 1998, or to Honor subsequent
17 to its merger with Star in 1999. Id.; Concord EFS Opp. at 10. Thus, Plaintiffs are free to
18 explore any changes made to these two networks to achieve their integration with Star or to
19 bring these networks into the Concord fold. This avenue for discovery, which is likely to
20 produce the information most relevant to Plaintiffs' lawsuit (because it will identify aspects
21 of the predecessor networks that needed to be altered in order to become part of the Star
22 network), remains open.

23 **3. Other Card Transactions.** The Court finds that "point-of-sale" transactions and
24 "on-us" transactions are appropriate areas for additional discovery, provided that such
25 transactions pertain to the Star network (or its members) and occur within the United States.
26 The fact that Star network gives customers access to their accounts via other types of
27 transactions that do not involve an interchange fee (if, in fact, these transactions do not
28 involve such a fee) is certainly relevant to Plaintiffs' claim that the interchange fee is

unnecessary and anti-competitive. (Of course, the Court does not intend to suggest any conclusion here about the probative value of such evidence, which may pertain to an entirely distinguishable economic arrangement). The Court does not hold that every document pertaining to a POS or on-us transaction is fair game, but rather that a blanket objection to these areas of inquiry is without merit. In the Court's view, more extensive exploration would be warranted as to POS transactions, which ostensibly employ the "machinery" of the Star ATM network, than would be warranted as to "on-us" transactions, which generally do not. The Court notes that many of the defendants appear to have produced information regarding such card transactions already. See Opp. of Wells Fargo, Bank One, Bank of America, and Wachovia at 10-14. Any further effort to compel production of such materials should be based not merely on the relevant nature of the transactions themselves, but rather on the need for specific subsets of POS or "on-us" information, as Plaintiff's demands were originally framed.

4. *Government Investigations and Other Litigation.* Plaintiffs seek materials "submitted pursuant to the Hart-Scott-Rodino Act" as well as "materials from private litigation" or arbitration proceedings on the basis that Defendants' "statements in pleadings or under oath . . . *may* contradict or estop Defendants' claims here." Motion at 4. Plaintiffs state that they "have attempted to limit the burden of searching for this requested information through the identification of a custodian with knowledge as to these issues and a list of litigation and arbitration proceedings." Id. at 21.

The Court concludes that the potential for turning up a needle does not require Defendants to sift through this haystack. Plaintiffs have identified no reason to think that Defendants have ever taken any prior inconsistent position in prior litigation or in their HSR filings. Instead, their justification for seeking such is purely speculative. Reply at 18 (noting that such materials would be relevant "*if* their own testimony in non-antitrust settings conflicts with their current litigation position"). Furthermore, Defendants have already agreed to produce such information if it "relates specifically to antitrust violations." Id. at 21-22. Under these circumstances, the Court concludes that the potential and speculative

benefit of such materials outweighs the burden of producing them. See Earley v. Champion Int'l Corp., 907 F.2d 1077, 1085 (11th Cir. 1990) (“A vague possibility that loose and sweeping discovery might turn up something suggesting that [Defendants have changed their view of the market or applicable antitrust principles] does not show particularized need and likely relevance that would require moving discovery beyond the natural focus of the inquiry.”).

5. Costs and Revenues. The Court finds that Plaintiffs’ requests for production of documents related to the costs and revenues associated with the Star ATM network is proper. Undoubtedly, the procompetitive justifications for a fee, which ostensibly supports the ATM network, must be assessed in light of the way a network operates, including the costs its members must bear and the revenues they receive from it. 2 Donald I. Baker et al., *The Law of Electronic Fund Transfer Systems* ¶ 24.07[5][c] (2006). The Court rejects Concord’s contention that the costs and revenues of the network itself are irrelevant, notwithstanding the fact that the interchange fee itself passes only from a card issuer to an ATM owner.

II. Information During Different Time Periods

Plaintiff’s motion to compel raises two controversies about the time periods as to which Plaintiffs may propound discovery requests. The first dispute pertains to historical information regarding the Star ATM network, and specifically to the time period between 1985 and 1995. The second dispute pertains to Defendants’ obligations to supplement their initial disclosures, which occurred in 2004 and 2005, with more contemporary information.

1. Historical Information. It appears that only Defendant Concord EFS poses an obstacle to Plaintiffs’ effort to obtain historical information for the time period from 1985 to 1995. See Reply at 5-7 (describing outstanding disputes with regard to each defendant). Further, both Plaintiffs and Concord EFS appear amenable to some sort of compromise on this issue. Indeed, the moving papers indicate that they may not be far apart at all. Concord EFS Opp. at 8 (discussing “an effort to reach compromise”); Reply at 15-16 (same).

The Court recognizes that historical information is important to Plaintiffs’ case, particularly insofar as it reflects changes to or discussion about the structure of the ATM

1 network. At the same time, the Court appreciates the burden of sifting through 700 boxes
2 and the many millions of documents contained therein. The Court therefore directs the
3 parties to proceed initially with their tentative compromise--that is, for Concord to provide an
4 index of its historical documents (however imperfect that summary document may be) and
5 then to provide Plaintiffs with a copy of their favorite thirty (30) boxes. If that production
6 proves insufficient, and if the parties are unable to agree upon an appropriate supplemental
7 disclosure, Plaintiffs will be free to renew their request to compel additional documents.
8 Until then, their motion to compel these historical materials is premature, and as to those
9 materials, the motion is therefore denied without prejudice. The Court encourages Concord
10 to furnish specific information, if possible, regarding the particular historical periods that
11 have attracted Plaintiffs' attention. See, e.g., Motion at 24 (stating interest in "historical
12 prices, including any changes over time, and evidence reflecting how Defendants made those
13 pricing decisions"); Reply at 16 (discussing the "advent of surcharges" and "the 1988
14 arbitration decision concerning Pulse interchange fees").

15 **2. Current Information.** Plaintiffs want supplemental disclosures covering all
16 contemporary materials up to the end of the year 2006. Defendant Concord EFS refuses to
17 provide materials subsequent to the initial searches and disclosures they made in 2004, while
18 certain of the Bank Defendants refuse to search for and produce discovery for materials
19 subsequent to the summer of 2005.

20 On the one hand, the Court appreciates Plaintiffs' contention that a great deal of time
21 has passed since the complaint was first filed. Motion at 25. The court is also mindful that
22 the present posture of the case raises specific discovery concerns, especially in light of the
23 proffered procompetitive justifications. Id. Yet given that there has been "no change to
24 ATM interchange fees since the amended complaint was filed," Concord EFS Opp. at 8, it is
25 difficult to see the value in requiring another round of supplemental disclosures simply in
26 order to gain a better understanding about "why Star maintained the same fixed interchange
27 fees." Opp. at 16. The purpose of supplemental disclosures is not to affirm what is already
28 known. It is to generate new and better information. See Fed. R. Civ. P. 27(e) (requiring a

1 party to supplement or to amend a prior response if “the information is disclosed is
2 incomplete or incorrect”). The civil discovery rules do not anticipate perpetual production.

3 Given that the parties have previously agreed to permit “specific, targeted” requests
4 for additional documents, and given the duration and unusual posture of this case, the Court
5 agrees that some additional production of contemporary materials is permissible. To that
6 end, the Court directs Plaintiffs to assemble a list of twenty (20) custodians from whom it
7 wishes to obtain additional records, and for the parties then to meet and confer regarding
8 additional production. Plaintiffs may of course seek additional contemporary information,
9 but if such requests merely seek a supplement about information already provided, Plaintiffs
10 will bear the burden either of demonstrating that such requests are based upon changed
11 circumstances or of showing cause why the information already disclosed is otherwise
12 inadequate.

13 **III. Format of Information**

14 The Supreme Court recently amended Rule 34, which now states that “a party who
15 produces documents for inspection shall produce them as they are kept in the usual course of
16 business,” and that unless a request specifies otherwise, the production of “electronically
17 stored information” shall be produced “in a form or forms in which it is ordinarily
18 maintained or in a form or forms that are reasonably usable.” Fed. R. Civ. P. 34(b)(i)-(ii).
19 The rule further provides that the form of electronic production required under the new rule
20 may be altered by agreement of the parties or by order of the Court. Id. A month after this
21 new rule went into effect, Plaintiffs propounded their Fourth Set of Requests for Production
22 of Documents. In their request, Plaintiffs state that Defendants must comply with the
23 amended rule as to any additional productions they make.

24 The Court declines to compel Defendants to comply with Rule 34 for future document
25 productions. When this litigation began, the parties agreed to the production of electronic
26 information in a particular format. Specifically, Defendants agreed to produce, and Plaintiffs
27 agreed to accept, electronic documents stored in the form of a “TIFF file” that is subject to a
28 scanning process known as “OCR.” In plain English, Defendants agreed to give Plaintiffs a

1 digital image of all electronic documents that they could search, albeit imperfectly, for
2 certain words and terms. An amendment to the civil rules--nearly two year after the filing of
3 the lawsuit, and long after the parties established a system for propounding electronic
4 discovery--does not justify the abdication of the parties' agreement, especially given the
5 security concerns raised by Defendants about maintaining the confidentiality of electronic
6 documents. Of course, if the parties can stipulate to the production of some materials in
7 native electronic format, they are free to do so. Otherwise, the Court orders that production
8 of additional materials shall proceed in accordance with the parties' prior agreement.

9 CONCLUSION

10 According to the findings and conclusions set forth above, Plaintiffs' motion to
11 compel is GRANTED in part and DENIED in part.

12 **IT IS SO ORDERED.**

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15 Dated: June 25, 2007



CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE